

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERTO AYALA,

Defendant-Appellant.

UNPUBLISHED

February 8, 2000

No. 208144

Oakland Circuit Court

LC No. 95-138883 FC

Before: Jansen, P.J., and Collins and J. B. Sullivan*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and was sentenced to three concurrent terms of fifteen to thirty years' imprisonment. Defendant's motion for a new trial or *Ginther*¹ hearing due to alleged ineffective assistance of counsel and prosecutorial misconduct was denied. Defendant appeals as of right. We affirm.

Whether to grant new trial is within the trial court's discretion, and its decision will not be reversed absent a clear abuse of that discretion. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999). An abuse of discretion occurs when the decision is so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias. *People v Torres (On Remand)*, 222 Mich App 411, 415; 564 NW2d 149 (1997).

Defendant first argues on appeal that he was denied a fair trial because of ineffective assistance of counsel. When reviewing a claim of ineffective assistance of counsel, this Court's review is limited to the facts contained on the record. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). The burden is on the defendant to establish factual support for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999), citing *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973).

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). To justify reversal on the basis of ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 314. The defendant must also overcome a strong presumption that his counsel's actions constituted sound trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). The failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). A substantial defense is one which might have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). That a strategy does not work does not render its use ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Defendant claims that trial counsel was ineffective for failing to demand that the prosecution produce an endorsed witness, Lakia Christy, at trial. We disagree. The trial court recognized that even if Christy, a close friend of the victim, was produced at trial and testified consistent with her affidavit that the victim informed her that her stepfather, not defendant, committed the alleged sexual abuse, Christy's testimony would have been admissible only for impeachment purposes and not as substantive evidence that someone other than defendant may have committed the alleged abuse, because she had no first-hand knowledge of the alleged sexual conduct. See MRE 602. At trial, the victim testified that defendant was her assailant and identified him as such to her mother, a police officer, and Dr. Etengoff, an emergency department physician.

In denying defendant's motion for rehearing, the trial court also noted that the victim's testimony that she was sexually assaulted was corroborated by medical evidence indicating that her hymen, which is normally intact in a nine-year-old, was not intact and had a tear, with scarring in the "3:00 position." While admitting that there were a number of ways in which a nine-year-old girl might have her hymen broken, Dr. Etengoff believed it was unlikely that something other than sexual abuse caused the scarring and the broken hymen. Although defendant claims that trial counsel should have presented an expert witness to offer evidence that a broken hymen was also consistent with the absence of sexual abuse, he presented no evidence, nor did he make an offer of proof, that the victim's tear and scarring could have been caused by something other than sexual abuse. Considering that Christy's presumed testimony would have been offered only to impeach the victim's credibility, and that the victim's testimony regarding the alleged sexual conduct was corroborated by other medical evidence, the trial court properly concluded that defendant failed to establish that he was prejudiced by his trial counsel's failure to insist on the production of Christy as a witness at trial. Defendant has not shown that there is a reasonable probability that the result of the proceeding would have been different had Christy testified at trial. *Pickens, supra* at 314. _

Defendant argues next that the trial court erred in concluding that defense counsel was not ineffective for failing to present an expert witness, such as Dr. Terence Campbell, to rebut a so-called myth or assumption that children cannot make up reports of sexual abuse. Again, we disagree. Dr. Campbell would have testified that the victim's memory was "confused and contaminated," and her testimony susceptible to "post-event suggestions" by her mother and stepfather. However, as the trial court recognized in denying defendant's motion for rehearing, "Dr. Campbell's testimony at most would have established that it was possible for [the victim] to have been influenced by her mother and stepfather after she had told them about the defendant's abuse and the police officer had come to the house, not that there was any likelihood that she was so influenced." Dr. Campbell would not have been permitted to testify about the veracity of the victim's testimony or her credibility. *People v Graham*, 173 Mich App 473, 478; 434 NW2d 165 (1988). We conclude that defendant has failed to show that he was deprived of a substantial defense by his counsel's failure to call Dr. Campbell. *Mitchell, supra*; *Hoyt, supra*.

Defendant next contends that trial counsel was ineffective for failing to object to bindover on a charge of anal "intercourse," where the evidence at the preliminary examination failed to establish any anal intercourse. However, as the trial court observed, "[w]hile there was no testimony of anal intercourse at the preliminary examination, there was evidence of sexual [digital] penetration of the anus and sexual penetration rather than intercourse is all that is required for a criminal sexual conduct." See MCL 750.520a(l); MSA 28.788(1)(l); *People v Hammons*, 210 Mich App 554, 557; 534 NW2d 183 (1995). Accordingly, we find no merit to this issue.

Next, there is no merit to defendant's claim that trial counsel was ineffective for failing to object to the admission of other acts evidence at trial. While the prosecutor made reference, without objection, to other acts in her opening statement, the record indicates that no such evidence was ever admitted at trial, and the trial court instructed the jury that the statements and arguments of counsel were not evidence. See *People v DeLisle*, 202 Mich App 658, 671; 509 NW2d 885 (1994).

Defendant also claims that trial counsel was ineffective for failing to investigate what therapy the victim was undergoing at the time she made the allegations of sexual abuse. As the trial court observed, however, defendant failed to make an offer of proof that the fact that the victim was in therapy affected her testimony. Therefore, defendant has failed to show that trial counsel was ineffective. The trial court likewise properly rejected defendant's claim that trial counsel was ineffective for failing to call attorney Jay Welter to testify about the visitation battle over the victim between defendant and the victim's mother where defendant failed to provide an offer of proof regarding this testimony.

The trial court also did not err in finding that defendant failed to show that trial counsel was ineffective for failing to effectively cross-examine the victim with regard to contradictions in her preliminary examination and trial testimony regarding anal intercourse. We agree with plaintiff that, even if the victim contradicted her statements about anal intercourse, she never contradicted her testimony about anal penetration, which sufficed to establish CSC-1. MCL 750.520b(1); MSA 28.788(2)(1); *Hammons, supra*.

Defendant also claims that trial counsel was ineffective because he failed to call character witnesses to bolster his credibility. However, defendant failed to identify these alleged witnesses or present an offer of proof regarding their proposed testimony. Accordingly, he has failed to show that the failure to call these witnesses deprived him of a substantial defense. *Mitchell, supra; Hoyt, supra.*

Next, defendant claims that trial counsel was ineffective because he elicited testimony from the victim on cross-examination that negated the testimony of defendant's mother, to the effect that she was present with defendant and the victim at all times when the alleged sexual conduct occurred. However, the record indicates that both defendant and his mother admitted that the latter was not present at all pertinent times. Moreover, the victim testified earlier on direct examination that there were times when she was alone with defendant. Accordingly, we find no merit to this claim.

Next, trial counsel's decision to call the victim's stepfather as a witness was a matter of trial strategy, and defendant has not overcome the presumption of sound strategy. *Mitchell, supra; Hoyt, supra.*

Defendant also claims that trial counsel was ineffective because he allowed the prosecutor to improperly impeach him with his pre-arrest silence and failure to contact the police. He further faults trial counsel for not objecting when the prosecutor argued in closing argument that, if defendant were innocent, he would have denied the accusations and declared his innocence. However, as the trial court properly determined, the prosecutor's cross-examination and argument did not involve the improper use of defendant's pre-arrest silence. See *People v Cetlinski*, 435 Mich 742, 746; 460 NW2d 534 (1990); *People v Alexander*, 188 Mich App 96, 101-103; 469 NW2d 10 (1991).

Defendant also complains that trial counsel failed to exercise common sense throughout the trial, particularly in his opening and closing arguments, where he effectively shifted the focus with regard to whether the prosecution had met its burden of proving that defendant was guilty beyond a reasonable doubt to "what would happen if they found Defendant not guilty." We disagree. The prosecution always had the burden of proving each and every element of the charged crimes beyond a reasonable doubt, and trial counsel's remarks in opening and closing argument did not alter that fact. *People v Fields*, 450 Mich 94, 116; 538 NW2d 356 (1995).

Finally, defendant claims that he was denied a fair trial because of prosecutorial misconduct. Because defendant failed to object to any of the alleged instances of prosecutorial misconduct at trial, appellate review is precluded unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *Stanaway, supra* at 687. Because there is no merit to defendant's alleged claims of error, our failure to review the issues will not result in a miscarriage of justice.

Affirmed.

/s/ Kathleen Jansen
/s/ Jeffrey G. Collins
/s/ Joseph B. Sullivan

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).